Kilang Gula Felda Perlis Sdn Bhd v Aman Shah bin Abdul Khalid

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R3-25-36 OF 1994
NIK HASHIM JC
30 SEPTEMBER 1997

Labour Law *— Employment — Whether person a 'workman' — Secondment from statutory body to private company — Claimant went on no-pay leave to pursue studies — Prior to departure claimant retired from government service to continue service with company — Whether claimant a 'workman' within definition of s 20 of the Industrial Relations Act 1967 — Correct test to be applied in determining whether claimant is a workman — Whether there was a contract of service between claimant and company — Industrial Relations Act 1967 s 20*

The claimant began his employment with the Federal Land Development Authority ('Felda') in 1968 and was seconded to Kilang Gula Felda Perlis Sdn Bhd ('the company') in 1973. On 16 July 1974, he was appointed as the general manager of the company. The company paid the claimant's salary as its employee, EPF contributions and relevant tax deductions from 1974 onwards. The claimant remained in that position for more than 10 years but in 1986 he decided to pursue further studies to become a lawyer. The claimant's application for two years' no-pay leave from Felda was approved. Prior to the claimant leaving for his studies, Felda offered the claimant the benefits of the amendments to the Statutory and Local Authorities Pensions (Amendment) Act 1985 ('the Pension Act') to retire from Felda and to continue with his employment with the company. The claimant exercised the option offered and this was approved by the Prime Minister under s 13 of the Pension Act effective from 1 October 1986. Upon his return from his studies in 1989, the claimant reported for duty to the company whereupon he was not appointed to his former position as general manager. Instead, the claimant was offered the temporary position as a public relations officer on a month-to-month basis. The claimant's remuneration was reduced from RM7,400 to RM4,000 per month. The claimant was also instructed to report to the present general manager. The claimant rejected the offer and considered himself to be constructively dismissed without just cause and excuse. Representations were made to the Director General of Industrial Relations under s 20 of the Industrial Relations Act 1967 ('the Act'). Before the Industrial Court, the company raised, inter alia, a preliminary objection that the claimant was not a 'workman' under s 20 of the Act as the claimant was merely on secondment and not an employee of the company and that there was no contract of service between the claimant and the company at all material times. The Industrial Court dismissed the preliminary objection. The company applied to the High Court to quash the decision of the Industrial Court.

Held, dismissing the application:

(1) There is high authority for the proposition that a flexible approach is the correct test to be applied in determining whether a claimant is a workman under the Act. The Act, being a piece of beneficent social legislation by which Parliament intended the prevention and speedy resolution of disputes between employers and their workmen, must receive a liberal and not a restricted or rigid interpretation. The determination of whether a particular claimant is a workman is a mixed question of fact and law for the Industrial Court to determine in accordance with equity and good conscience and without regard to technicalities and legal forms. Applying the principles to the present case, the Industrial Court was correct in finding that claimant was an employee and workman of the company from 1 October 1986 and a contract of service was brought into existence on that date (see p 706A–D); *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369, *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304 and *Harris Solid State (M) Bhd & Ors v Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489 followed.

(2) The claimant was appointed general manager on 16 July 1974, and since then, there was no revocation or termination of that appointment nor did the claimant resign from that position. Moreover, the claimant's study leave was not unauthorized. There was no break in the claimant's service to the company upon his return from study leave and his services continued even though the claimant retired from Felda. In the circumstances, the Industrial Court was correct when it held that the claimant signed the option to retire from Felda and continued his employment in the company before going on study leave while still serving the company (see pp 706E–G and 707B).

(3) It was against good conscience and equity on the part of the company to abandon and disown the claimant upon his return from study leave after having served the company for 22 years and to insist that the claimant was not its employee merely because the claimant retired from Felda and there was no express contract of service. A contract of service under the Act need not be in writing. It can be implied. Technicalities and legal forms have no place in industrial adjudication. In the circumstances, there was ample evidence both oral and documentary before the Industrial Court to support its conclusion (see p 707D–H).

[Bahasa Malaysia summary

Pihak menuntut memulakan penggajian dengan Federal Land Development Authority ('Felda') pada tahun 1968 dan telah dipinjamkan ke Kilang Gula Felda Perlis Sdn Bhd ('syarikat tersebut') pada tahun 1973. Pada 16 Julai 1974, dia telah dilantik sebagai pengurus besar syarikat tersebut. Syarikat tersebut telah membayar

gaji pihak menuntut sebagai pekerjanya, caruman KWSP dan penolakan cukai yang relevan mulai tahun 1974. Pihak menuntut kekal dalam jawatan itu selama lebih daripada 10 tahun tetapi pada tahun 1986 dia memutuskan untuk melanjut pelajaran untuk menjadi seorang peguam. Permohonan pihak menuntut untuk cuti tanpa gaji selama dua tahun daripada Felda telah diluluskan. Sebelum pihak menuntut berlepas untuk pelajaran, Felda telah menawarkan kepada pihak menuntut faedah-faedah pindaan kepada Akta Pencen Pihak-Pihak Berkuasa Berkanun dan Tempatan (Pindaan) 1985 ('Akta Pencen') supaya bersara daripada Felda dan untuk meneruskan penggajiannya dengan syarikat tersebut. Pihak menuntut melaksanakan opsyen yang ditawarkan dan ini telah diluluskan oleh Perdana Menteri di bawah s 13 Akta Pencen mulai dari 1 Oktober 1986. Apabila dia pulang dari pengajiannya pada tahun 1989, pihak menuntut telah melapor diri untuk bertugas dengan syarikat tersebut yang mana dia tidak dilantik kepada jawatan dahulu sebagai pengurus besar. Sebaliknya, pihak menuntut ditawarkan jawatan sementara sebagai seorang pegawai perhubungan awam pada dasar dari sebulan ke sebulan. Ganjaran pihak menuntut telah dikurangkan daripada RM7,400 hingga RM4,000 sebulan. Pihak menuntut juga diarahkan supaya melapor diri kepada pengurus besar sekarang. Pihak menuntut telah menolak tawaran ini dan menganggap dirinya dipecat secara konstruktif tanpa sebab dan alasan yang munasabah. Representasi telah dibuat kepada Ketua Pengarah Perhubungan Perusahaan di bawah s 20 Akta Perhubungan Perindustrian 1967 ('Akta tersebut'). Di hadapan Mahkamah Perusahaan, syarikat tersebut membangkitkan, antara lain, satu bantahan permulaan bahawa pihak menuntut bukanlah seorang 'pekerja' di bawah s 20 Akta tersebut kerana pihak menuntut hanya dipinjam dan bukanlah seorang pekerja syarikat tersebut dan bahawa tidak terdapat kontrak perkhidmatan di antara pihak menuntut dan syarikat tersebut pada semua masa material. Mahkamah Perusahaan menolak bantahan permulaan. Syarikat tersebut memohon kepada Mahkamah Tinggi supaya membatalkan keputusan Mahkamah Perusahaan.

Diputuskan, menolak permohonan:

(1) Terdapat autoriti yang kukuh untuk saranan bahawa pendekatan yang fleksibel adalah ujian yang betul untuk dipakai dalam menentukan sama ada pihak menuntut adalah seorang pekerja di bawah Akta tersebut. Akta tersebut, yang merupakan perundangan sosial amal menerusi mana Parlimen berniat pencegahan dan penyelesaian pertikaian yang cepat di antara pihak majikan dan pekerja mereka, mestilah diberikan tafsiran yang liberal dan bukan tafsiran yang terhad atau yang ketat. Penentuan tentang sama ada pihak menuntut yang tertentu adalah pekerja merupakan persoalan fakta dan undang-undang untuk Mahkamah Perusahaan untuk menentukan menurut ekuiti dan hati nurani yang baik dan

tanpa mempedulikan keteknikan dan dokumen undang-undang. Dengan memakai prinsip-prinsip kepada kes ini, Mahkamah Perusahaan adalah betul dalam mendapati bahawa pihak menuntut adalah seorang pekerja syarikat tersebut dari 1 Oktober 1986 dan suatu kontrak perkhidmatan telah pun diwujudkan pada tarikh itu (lihat ms 706A–E); *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369, *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304 dan *Harris Solid State (M) Bhd & Ors v Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489 diikut.

(2) Pihak menuntut dilantik sebagai pengurus besar pada 16 Julai 1974, dan sejak itu, tiada pembatalan atau pemberhentian jawatan itu dan pihak menuntut tidak juga meletak jawatan. Tambahan pula, cuti belajar pihak menuntut bukanlah tanpa izin. Perkhidmatan pihak menuntut dengan syarikat tersebut tidak terputus selepas pulang daripada cuti belajar dan perkhidmatannya berterusan sungguhpun pihak menuntut bersara daripada Felda. Dalam keadaan ini, Mahkamah Perusahaan adalah betul apabila ia memutuskan bahawa pihak menuntut menandatangani opsyen itu untuk bersara daripada Felda dan meneruskan penggajian dengan syarikat tersebut sebelum berlepas untuk cuti belajar sementara masih berkhidmat dengan syarikat tersebut (lihat ms 706E–G dan 707B).

(3) Adalah bertentangan dengan hati nurani and ekuiti yang baik pada pihak syarikat tersebut untuk meninggalkan dan tidak mengaku pihak menuntut selepas dia pulang daripada cuti belajar setelah berkhidmat dengan syarikat tersebut selama 22 tahun dan untuk mendesak bahawa pihak menuntut bukanlah pekerjanya hanya kerana pihak menuntut bersara daripada Felda dan tidak terdapat kontrak perkhidmatan yang nyata. Suatu kontrak perkhidmatan di bawah Akta tersebut tidak perlu berbentuk bertulis. Ia boleh disiratkan. Keteknikan dan dokumen undang-undang tidak mempunyai tempat dalam penghukuman perusahaan.Dalam keadaan ini, terdapat keterangan yang lebih daripada mencukupi berbentuk lisan dan dokumentar di hadapan Mahkamah Perusahaan unuk menyokong kesimpulannya (lihat ms 707D–H).]

Notes

For cases on whether a person is a 'workman', see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 912–914.

Cases referred to

Dr A Dutt v Assunta Hospital [1981] 1 MLJ 304 (refd)

Harris Solid State (M) Bhd & Ors v Bruno Gentil s/o Pereira & Ors [1996] 3 MLJ 489 (refd)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369 (refd) A

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & another appeal [1996] 1 MLJ 481 (refd)

Legislation referred to B

Industrial Relations Act 1967 ss 2, 20, 30(5)
Rules of the High Court 1980 O 53
Statutory and Local Authorities Pensions (Amendment) Act 1985 s 13

S Kulasegaran (*Usha Kulasegaran* with him) (*Ranjit Thomas & Kula*) for the applicant. C

VK Lingam (*Peter Raj* with him) (*VK Lingam & Co*) for the respondent.

Cur Adv Vult

D

Nik Hashim JC: The claimant was employed by the Federal Land Development Authority ('Felda') in 1968. On 1 January 1973, he was seconded to Kilang Gula Felda Perlis Sdn Bhd ('the company') as assistant general manager and in 1974 the board of directors of the company at its meeting on 16 July 1974 appointed the claimant as the general manager of the company. The claimant continued to function as the general manager E of the company for more than 10 years when in 1986 he decided to pursue further studies to become a lawyer. He applied for two years' no-pay study leave from Felda and it was approved. Meanwhile, on 1 April 1987 En Rosman Hasim was appointed on secondment from Felda to replace the claimant as the general manager of the company. Before the claimant F went on no-pay study leave, Felda offered the claimant the benefits of the amendment to the Statutory and Local Authorities Pensions (Amendment) Act 1985 ('the Pension Act') to retire from Felda and to continue his service with a joint venture company or corporation, in this case the company. The claimant exercised the option given to him on 21 April 1987 and his retirement from Felda was approved by the Prime Minister G under s 13 of the Pension Act with effect from 1 October 1986. On his return from England with his LLB degree on 24 June 1989, he reported for duty to the company. However, he was not permitted to resume his position as general manager of the company. The company offered him instead a temporary appointment as a public relations officer of the company H on a month-to-month basis at a total salary of RM4,000 per month compared to the RM7,400 per month when he was paid by the company as the general manager. Further, he was asked to report to the present general manager, a post which the claimant had held for 13 years. Not surprisingly, the claimant rejected the offer and considered himself constructively dismissed without just cause or excuse by the company, and I accordingly, he made representations to the Director General of Industrial Relations under s 20 of the Industrial Relations Act 1967 ('the Act') claiming reinstatement into his former position as the general manager of the company without loss of wages, privileges and benefits.

A At the hearing in the Industrial Court, the company raised preliminary objections contending that the claimant was not a 'workman' under s 20 of the Act because firstly:

(a) the claimant was only on secondment and therefore never the company's employee at all;

B (b) there was no contract of service between the company and the claimant at any time at all and therefore the claimant was not an employee of the company;

and secondly, the company contended that even assuming that the claimant was the general manager, he was the directing mind and will of the C company and therefore not a workman of the company.

The claimant gave evidence before the Industrial Court. Mr Satchithanandhan, the learned chairman of the Industrial Court in his Award No 84 of 1994, dismissed the preliminary objections of the company and held that at the material time there was a contract of service between D the claimant and the company, and that the claimant was a workman under the Act employed by the company. With regard to the second contention, the learned chairman held that the claimant as the general manager of the company was a workman and not part of the directing mind and will of the company.

E Before me, learned counsel for the company, in its application under O 53 of the Rules of the High Court 1980 for an order for certiorari to quash the award, however, dropped the second contention that as the general manager, the claimant was part of the directing mind and will of the company, but proceeded only with the first objection that the claimant was not a workman under the Act on the ground that the claimant was F only on secondment and that there was no contract of service between the claimant and the company. In his written and oral submission, counsel argued, among other things, that the company had nothing to do with the claimant as the claimant was never in law or in fact an employee of the company. There is no letter from the company to the claimant before he G retired from Felda that the company would employ him. There is no provision under s 13 of the Pension Act to say that the claimant can, by opting to retire from Felda, automatically become the employee of the company. He further complained that the award is perverse.

Who is a 'workman'? Section 2 of the Act defines 'workman' as:

H ... any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment had led to that dispute.

I whereas:

'contract of employment' means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman; ... .

There is high authority for the proposition that a flexible approach is the correct test to be applied in determining whether a claimant is a workman under the Act. The Act, being a piece of beneficent social legislation by which Parliament intends the prevention and speedy resolution of disputes between employers and their workmen, must receive a liberal and not a restricted or rigid interpretation. It was not the intention of Parliament to assign a fixed or rigid meaning to this expression (per Gopal Sri Ram JCA in the Federal Court case of *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369). The determination whether a particular claimant is a workman under the Act is a mixed question of fact and law and it is for the Industrial Court to determine this question (*Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304). It is trite law that the Industrial Court is required to decide a case in accordance with equity and good conscience without regard to technicalities and legal forms (s 30(5) of the Act; *Harris Solid State (M) Bhd & Ors v Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489).

Applying the above principles to the present case, I hold that the learned chairman of the Industrial Court is right in finding the claimant an employee and workman of the company from 1 October 1986, and a contract of service between the claimant and the company was brought into existence on that date. The board of directors of the company at its meeting on 16 July 1974 (exh CO-1 p 23) appointed the claimant as its general manager with effect from 1 July 1974, and since then, there was no revocation or termination of that appointment by the company, neither did the claimant ever resign from that position. Before proceeding on no-pay study leave, the company never made known to the claimant that he could not continue serving as the general manager of the company on his return. Encik Rosman Hasim was appointed on secondment only to replace the claimant while he was away on study leave. The company knew of this fact through the exchange of letters between Felda and the company and the minutes of the 52nd executive committee meeting of the company at 6.0(1) (exh CL-9). The claimant's study leave was not unauthorized. Therefore, there was no break in his service with the company upon his return from study leave. His service continued with the company even though he retired from Felda. Surely, the claimant would not have exercised the option to retire if he were to discontinue serving the company. The claimant said in his evidence:

> I exercised the option on 21 April 1987 opting out of Felda into the employment of the company.

His exercise for the option is amplified by a letter addressed to him by the deputy director of Felda which reads:

> I will repeat and reiterate that you and a few other Felda officers and Felda staff who have been working with a corporation and joint venture company have obtained Government approval to retire before the required retirement age (frozen pension). This will enable the officers and staff of Felda to enjoy the benefits of their pension and simultaneously continue to work for the

> corporation. Your retirement took effect from 1 October 1986. This means that you are no longer in the employment of Felda, in lieu of the above-mentioned retirement.

In the circumstances, the Industrial Court was correct when it ruled at p 11 of the award that the claimant signed the option to retire from Felda and continued his employment in the company before he left on study leave while still serving the company. With respect, I agree with the submission of learned counsel for the claimant that the amendment under s 13 of the Pensions Act was never meant to make the claimant retire from Felda and become unemployed. The company had paid the claimant's salary as its employee since 1 August 1974 onwards. The company also paid the claimant's EPF contribution and made the relevant income tax deductions as the employer of the claimant.

It is against good conscience and equity on the part of the company to abandon and disown the claimant on his return from study leave and after serving the company for 22 years, and to insist that the claimant was not its employee merely because he had retired from Felda and that there was no express contract of service between the claimant and the company. I agree wholly with the finding of the learned chairman when he said at p 12 of this award:

> It is therefore not in accord with good conscience and equity for the company, its directors and management to plead ignorance or turn a blind eye to the glaring fact that the claimant, its general manager, was by the exercise of the aforesaid option absorbed into the permanent employment of the company and would continue in the service of the company as its general manager upon his return from his legal studies.

A contract of service under the Act need not be in writing. It can be implied. Technicalities and legal forms have no place in industrial adjudication (s 30(5)). A liberal and not a restricted or rigid interpretation is to be adopted and applied in determining whether the claimant was a workman and whether there was a contract of service between the company and the claimant (*Hoh Kiang Ngan*). Under the Federal Constitution, the claimant has a fundamental constitutional right to a livelihood, and that right cannot be brushed aside conveniently by the company (see *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & another appeal* [1996] 1 MLJ 481). In the circumstances of this case, there is ample evidence both oral and documentary before the Industrial Court to support its conclusion. It is clear, from its award, that the Industrial Court had asked itself the right question and had taken into account relevant considerations including the testimony of the claimant in court when arriving at its decision in dismissing the objections.Therefore, I am of the view that the findings by the Industrial Court that the claimant is a workman and that there was a contract of service between the claimant and the company, based upon its evaluation of the evidence adduced before it, are correct. Its decision is not perverse. Accordingly, I am satisfied that the Industrial Court did not commit any error of law when it came to its conclusion.

In the event, I dismiss the application with costs, and further order that the Industrial Court proceed hearing the case to its conclusion as soon as possible.

Application dismissed.

Reported by Lew Chee Seong